

No. 18398

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMY CORPORATION, a California Corporation,

Appellant,

vs.

ROBERT A. RIDDELL, Individually and as District Director of Internal Revenue, Los Angeles, California,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California

BRIEF FOR THE APPELLEE

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TOPICAL INDEX

| | Page |
|---|-----------|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statutes and regulations involved | 2 |
| Statement | 2 |
| Summary of argument | 5 |
| Argument | 8 |
| The District Court did not err in denying the taxpayer's request for injunctive relief against the collection of tax assessments which had been issued under the provisions of Section 6871(a) of the Internal Revenue Code of 1954 | 8 |
| A. Section 7421(a) of the 1954 Code explicitly prohibits suits to enjoin the assessment or collection of any tax | 8 |
| B. The Section 6871(a) assessments against the taxpayer are valid and subsisting and they may be collected even though the director's tax claims were never adjudicated during the course of the taxpayer's receivership | 14 |
| Conclusion | 17 |
| Appendix—Pertinent statutes and applicable treasury regulations involved | App. p. 1 |

TABLE OF AUTHORITIES CITED

| Cases | Page |
|---|------------|
| Cohen v. Gross, 316 F. 2d 521 | 12 |
| Enochs v. Williams Packing Co., 370 U. S. 1, re- hearing denied, 370 U. S. 965 | 11, 12, 13 |
| Matthews v. Rodgers, 284 U. S. 521 | 13 |
| Miller v. Nut Margarine Co., 284 U. S. 498 | 13 |

Statutes

Internal Revenue Code of 1954:

| | |
|---|---------------------------------|
| Sec. 6212 (26 U.S.C. 1958 ed., Sec. 6212) 5, 6, 9, 11 | |
| Sec. 6213 (26 U.S.C. 1958 ed., Sec. 6213) | |
| | 5, 6, 9, 11, 12 |
| Sec. 6871 (26 U.S.C. 1958 ed., Sec. 6871)..2, 3, 5, 6 | |
| | 7, 8, 9, 10, 11, 12, 14, 15, 16 |
| Sec. 6873 (26 U.S.C. 1958 ed., Sec. 6873) | 15, 16 |
| Sec. 7421 (26 U.S.C. 1958 ed., Sec. 7421) | |
| | 5, 6, 10, 11, 12 |
| 28 U.S.C.: | |
| Sec. 1346 | 13 |
| Sec. 1491 | 13 |

Miscellaneous:

Treasury Regulations on Procedure and Administration (1954 Code):

| | |
|--------------------------|--------|
| Sec. 301.6213-1 | 2 |
| Sec. 301.6871(a)-1 | 2 |
| Sec. 301.6871(a)-2 | 14 |
| Sec. 301.6873-1 | 15, 16 |

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BRIEF FOR THE APPELLEE

Opinion Below

The District Court wrote no opinion except as contained in its findings of fact and conclusions of law (R. 46-47),¹ which are not officially reported.

Jurisdiction

The appeal in this case involves an assessment of federal income taxes against the taxpayer in the total amount of \$8,988.32 for its fiscal years ending August 31, 1956, and August 31, 1957. (R. 46-47.) This suit, an action to enjoin the collection of taxes, was commenced by the taxpayer on November 23, 1962

¹"R." references are to Volume I of the record on appeal.

(R. 2-9), and on December 12, 1962, after a hearing on the taxpayer's motion for a preliminary injunction, the District Court dismissed the action (R. 46-47). The taxpayer filed a timely notice of appeal on January 8, 1963. (R. 51.) The claim is made by the taxpayer (Br. 2) that this Court has jurisdiction to hear this appeal "pursuant to the provisions of §§ 1291, 1292 and 1294 of the Judicial Code, 28 U.S.C.A. §§ 1291, 1292 and 1294."

Question Presented

Whether the District Court erred in dismissing the taxpayer's suit for an injunction against the District Director for the purpose of restraining him from collecting unpaid taxes which earlier had been assessed against the taxpayer under Section 6871 of the Internal Revenue Code of 1954 while it was in receivership.

Statutes and Regulations Involved

The pertinent statutes and applicable Treasury Regulations appear in the Appendix, *infra*.

Statement

The facts as found by the District Court (R. 46-47), and as alleged by the taxpayer in its verified complaint (R. 2-8) may be summarized as follows:

The taxpayer is a California corporation whose stock during July, 1956, was owned equally by James A. McKinnon and Amy S. McKinnon, husband and wife. During that month the McKinnons separated and a divorce action was commenced by the wife in the Superior Court of the State of California. Thereafter, and on or about April 27, 1959, Amy S. McKinnon

commenced an action, also in that court, for the involuntary dissolution of the taxpayer corporation on the ground that disunity between its two stockholders prevented it from properly functioning as a business entity and that, therefore, it was a deadlocked corporation. (R. 2-3, 46.)

A receiver in the involuntary dissolution proceedings was appointed by the Superior Court on or about May 20, 1959. On or about November 9, 1959, the District Director of Internal Revenue at Los Angeles, California, caused two assessments of federal income taxes, in the respective amounts of \$4,026.24 and \$4,962.08, to be made against the taxpayer for each of the fiscal years here in issue, pursuant to Section 6871 of the Internal Revenue Code of 1954. At that time a written notice of these assessments was given to the receiver and, on or about January 22, 1960, the District Director filed a "Claim of United States for Internal Revenue Taxes" in the receivership proceedings. (R. 3-5, 46-47; Exs. A and B, R. 10-12.)

On or about March 28, 1962, the taxpayer's receiver filed a petition in the Superior Court of California requesting instructions from the court with regard to a proposed sale of real property owned by the taxpayer. Attached to this petition was an accounting of the receiver's receipts and disbursements and a list of the taxpayer's creditors. Included in the list of creditors was the claim of the District Director for the assessed but unpaid taxes for the two fiscal years in issue. (R. 5.)

The receiver's petition was set for a hearing on or about May 2, 1962. However, this hearing never took place owing to a stipulation by the dissident stock-

holders calling for a termination of the receivership proceedings. Pursuant to this stipulation the Superior Court of California immediately ordered the dismissal of the receiver and the termination of the receivership proceedings, and further ordered the return to the taxpayer of all of its assets then in the possession of the receiver. The Director's claim for the assessed taxes was, therefore, never paid. (R. 5-6.)

Thereafter, and on or about October 4, 1962, a demand was made upon the taxpayer for the payment of the taxes which earlier had been assessed against it. After several conferences with representatives of the District Director, the taxpayer instituted the present action on November 23, 1962, in order to enjoin collection of the assessed taxes. (R. 2, 6.) On November 23, 1962, the District Court granted the taxpayer's *ex parte* application for a temporary restraining order against collection of the taxes in question. (R. 19-21.) After a hearing on the taxpayer's motion for a preliminary injunction on November 26, 1962, the District Court dissolved its temporary restraining order, denied the taxpayer's motion, and dismissed the action with prejudice. (R. 46-47; Tr. 4-30.)² The grounds for this determination by the District Court are set forth as follows in its Conclusions of Law (R. 47):

1. The District Director of Internal Revenue at Los Angeles, California, made valid assessments against plaintiff [taxpayer] for deficiency income taxes for the fiscal years ending August 31, 1956 and August 31, 1957.

²"Tr." references are to the transcript of proceedings contained in Volume II of the record on appeal.

2. The plaintiff is prohibited by Section 7421, Internal Revenue Code of 1954, from instituting suit to restrain collection of any tax.

3. This Court has no jurisdiction of the subject matter of this action.

On January 8, 1963, the taxpayer filed its notice of appeal, and on January 11, 1963, the District Court denied its motion for an injunction pending this appeal. (R. 51, 72.) Upon the taxpayer's *ex parte* application this Court, on January 18, 1963, issued a temporary restraining order against the District Director. This order was withdrawn when, on February 4, 1963, a stipulation of the parties maintaining the *status quo* pending appeal was filed with and approved by this Court.

Summary of Argument

The taxpayer here has instituted this action for the purpose of enjoining the Director from collecting federal income taxes which had previously been assessed against it while it was in receivership. Section 6871 (a) of the Internal Revenue Code of 1954, the statute under which the assessments against the taxpayer were made, provides for the immediate assessment of taxes without prior notice to the taxpayer and without affording the taxpayer an opportunity to petition the Tax Court. This statute becomes operative as against taxpayers who are involved in receivership or bankruptcy proceedings and it supersedes Sections 6212(a) and 6213(a) of the 1954 Code, which are the statutes normally applied in determining and assessing tax deficiencies and which require that before an assessment is made, the taxing authorities must notify the taxpayer

of the proposed deficiency determination, and after such notification the taxpayer is allowed a specified period of time within which to petition the Tax Court for a redetermination. Where the assessment is to be made pursuant to Sections 6212 (a) and 6213 (a), the taxpayer is afforded injunctive relief should the taxing authorities attempt to prematurely assess or collect the proposed deficiency. Under Section 7421 (a) this injunctive relief is not otherwise available to a taxpayer.

The District Court was correct in dismissing the taxpayer's suit for lack of jurisdiction. The taxpayer had no right to a notice of deficiency or to file a petition with the Tax Court. The assessments were made in this case pursuant to Section 6871 (a) and, therefore, Section 7421(a) explicitly prohibits the relief sought by the taxpayer. Any defense which the taxpayer may have, either against the collection of these assessments or as to the merits of its liability, must be raised in a suit for a refund. And, even if equitable intervention could be granted despite the provisions of Section 7421 (a), the taxpayer should not be permitted to enjoin the Director because it has not shown that it would suffer irreparable harm if it is compelled to pay the taxes in question and then sue for a refund.

The basis for the taxpayer's attack on the proposed collection of the Section 6871 (a) assessments issued against it is that there was no adjudication of the merits of these assessments before the receivership court. It is true, of course, that such an adjudication

could have taken place pursuant to the provisions of Section 6871 (b). However, the loss of the opportunity to have such a hearing was caused by the termination of the receivership proceedings—pursuant to the stipulation of the taxpayer's stockholders—before the claims of the taxpayer's creditors could be approved and paid. The taxpayer, therefore, is in the same position as any taxpayer who chooses to ignore a statutory notice of deficiency and thus does not avail himself of the opportunity to go to the Tax Court. Like the instant taxpayer, such a taxpayer may have his day in court, but he must first pay the tax deficiency and thereafter sue for a refund.

Furthermore, collection of unadjudicated tax claims assessed under Section 6871 (a) is expressly authorized by the pertinent Treasury Regulations. Therefore, if the Director is made to bear the taxpayer's loss of a hearing before the receivership court, he may nevertheless collect the assessment in, for example, a lien foreclosure proceeding or a proceeding to reduce the tax assessment to judgment.

ARGUMENT

The District Court Did Not Err in Denying the Taxpayer's Request for Injunctive Relief Against the Collection of Tax Assessments Which Had Been Issued Under the Provisions of Section 6871 (a) of the Internal Revenue Code of 1954

A. Section 7421(a) of the 1954 Code Explicitly Prohibits Suits to Enjoin the Assessment or Collection of Any Tax.

The taxpayer has instituted this suit for a permanent injunction for the purpose of restraining the District Director from employing any means whatsoever to collect federal income taxes which earlier had been assessed against the taxpayer for both taxable periods in issue under the provisions of Section 6871 (a) of the Internal Revenue Code of 1954 (Appendix, *infra*). Prior to the making of these assessments (on November 9, 1959), the taxpayer was placed in receivership and a receiver was appointed by the Superior Court of the State of California on or about May 20, 1959, pursuant to a petition filed about one month earlier by one of the taxpayer's dissident stockholders who sought to have the taxpayer involuntarily dissolved. (R. 3-4, 46.) Although these state court proceedings lasted for about three years, the taxpayer was never dissolved and the receiver never distributed the taxpayer's assets to its creditors and others, owing to a stipulation by the taxpayer's stockholders calling for the termination of the receivership proceedings. Acting upon this stipulation, the Superior Court ordered the immediate dismissal of the receiver, the termination of the receivership proceedings, and the return to the taxpayer of all of its

assets then in the possession of the receiver. (R. 5, 47.)

Under Sections 6212 (a) and 6213 (a) (both Appendix, *infra*), the Internal Revenue Code of 1954 provides that in the normal course of events the assessment and collection of a tax deficiency must be preceded by the sending of a notice of deficiency and by the lapse of the time specified by statute within which a taxpayer may petition the Tax Court for a redetermination of the proposed deficiency, and, if such a petition is filed, by a final decision of the Tax Court. In the event that the taxing authorities attempt to prematurely assess or collect the proposed tax deficiency, the taxpayer may avail himself of the injunctive relief afforded by Section 6213 (a).

There are, however, no such prerequisites to a determination of a tax deficiency against a taxpayer involved in bankruptcy or, as here, receivership proceedings. Section 6871 (a) of the 1954 Code, under which the assessments in this case were made, provides in material part that—

Upon * * * the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided by law) determined by the Secretary or his delegate in respect of a tax imposed by subtitle A or B upon such taxpayer shall, despite the restrictions imposed by section 6213 (a) upon assessments, be immediately assessed if such deficiency has not theretofore been assessed in accordance with law.

Not only is the right to a prior notice of deficiency annulled by this statute but, in addition, subsection (b) thereof (Appendix, *infra*) abrogates the right to file a petition for a redetermination by the Tax Court, as follows—

no petition for any such redetermination shall be filed with the Tax Court after the adjudication of bankruptcy, the filing or (where approval is required by the Bankruptcy Act) the approval of a petition of, or the approval of a petition against, any taxpayer in any other bankruptcy proceeding, or the appointment of the receiver.

And, since the taxpayer involved in receivership or bankruptcy proceedings has no right to a notice of deficiency, and no right to petition the Tax Court before an assessment of a tax deficiency against him, the injunctive relief afforded other taxpayers is also made unavailable to him by the provisions of Section 7421 (a) of the 1954 Code (Appendix, *infra*), which provides that—

Except as provided in sections 6212(a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

The taxpayer does not challenge the validity or the regularity of the Section 6871 assessments which were here issued against it while it was involved in the receivership proceedings instituted by one of its stockholders. Indeed, the taxpayer has contented itself with an attack (Br. 14) on the “proposed collections by appellee of the asserted deficiencies,” and it seeks injunctive relief solely on the theory (Br. 15) that it had an inalienable right to a “judicial determination by the re-

ceivership court as to the correctness of the asserted deficiency prior to any payment of the same.” Therefore, the taxpayer argues (Br. 14-18), it is entitled to an injunction under Section 6213(a) against the “proposed collections” because the Director’s claim for the assessed taxes was not adjudicated prior to the stipulated termination of the receivership proceedings.

Putting aside for the moment the question raised by the taxpayer’s argument, the initial issue before this Court is whether any jurisdiction exists to enjoin the collection of income taxes assessed under the provisions of Section 6871 (a) in the light of the prohibition against the maintenance of a suit for injunctive relief contained in Section 7421 (a).

As previously noted, Section 7421 (a) clearly states that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.” The object of this statutory provision “is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes.” *Enochs v. Williams Packing Co.*, 370 U. S. 1, 5, rehearing denied, 370 U. S. 965. The only exceptions to this express prohibition are with respect to a notice of deficiency and to proceedings before the Tax Court (Sections 6212 and 6213). However, neither of these exceptions is germane here owing to the overriding and superseding provisions of Section 6871 which allow the immediate assessment of tax deficiencies—without a notice of deficiency and without recourse to the Tax Court—with respect to taxpayers involved in bankruptcy or receivership proceedings. Since the assessments in this case were duly made in conformity with Section 6871, it follows that Sec-

tion 6213 (a) is inapposite and that Section 7421 (a) applies with full force and precludes the action brought here. *Cohen v. Gross*, 316 F. 2d 521, 523-524 (C. A. 3d). As the Supreme Court said in *Enochs v. Williams Packing Co.*, *supra*, p. 7:

The manifest purpose of § 7421 (a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention and to require that the legal right to the disputed sums be determined in a suit for refund.

But, even assuming *arguendo* that this Court has jurisdiction to intervene³ against the proposed collection of the Section 6871 (a) assessments despite the provisions of Section 7421 (a), it is nevertheless clear that such an injunction would be inappropriate in this case.

The taxpayer has here chosen to base its claim to injunctive relief solely upon the argument that the collection of these assessments would (Br. 19) be "illegal." But in the circumstances of this case it is not at all clear, as we shall observe more fully under subsection B of this argument, that "under no circumstances could the Government ultimately prevail" with respect to the assessments here made under Section 6871 (a); and it is clear that those assessments were not exactions "merely in 'the guise of a tax.'" *Enochs v. Williams Packing Co.*, *supra*, p. 7. Furthermore, it is well

³It should be noted that such intervention would have to be made pursuant to the general equity powers of this Court. Section 6213 (a) of the 1954 Code which provides for injunctive relief in tax cases under certain prescribed situations is no longer "relevant to the situation" of a taxpayer involved in receivership or bankruptcy proceedings. *Cohen v. Gross*, 316 F. 2d 521, 523 (C.A.3d).

settled that “a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality.” *Miller v. Nut Margarine Co.*, 284 U.S. 498, 509. The taxpayer must also allege and prove that the payment of the illegal tax would cause it irreparable harm. *Enochs v. Williams Packing Co.*, *supra*, p. 6. No such proof is possible in this case since the taxpayer has an adequate remedy at law in the form of a suit for a refund—either in the District Court (under the provisions of 28 U.S.C., Section 1346) or in the Court of Claims (under the provisions of 28 U.S.C., Section 1491)—during the course of which it can raise all of the defenses which it claims it now has and, additionally, it can contest the actual merits of its liability.

The precise reason why the taxpayer is not now in a position to prove that it would suffer irreparable harm if it is denied injunctive relief is that the facts in its complaint disclose that (R. 8) it is “financially solvent” and “owns approximately \$23,000.00 cash and real property worth approximately \$200,000.00”, and it is, therefore, apparently able to pay the tax claim in question without detriment to its enterprise. Since the taxpayer has never alleged the existence of “special circumstances” (*Matthews v. Rodgers*, 284 U.S. 521, 528), such as a claim that such payment would “destroy its business, ruin it financially and inflict loss for which it would have no remedy at law” (*Miller v. Nut Margarine Co.*, *supra*, pp. 510-511), a refund suit “affords an adequate legal remedy” and destroys the basis for injunctive relief (*Matthews v. Rodgers*, *supra*, p. 528).

B. The Section 6871(a) Assessments Against the Taxpayer Are Valid and Subsisting and They May Be Collected Even Though the Director's Tax Claims Were Never Adjudicated During the Course of the Taxpayer's Receivership

The determination below should also be affirmed for reasons other than jurisdictional. The taxpayer argues at length (Br. 14-18) about its purported right to an adjudication of the Director's tax claim during the course of its receivership proceedings. On the assumption that it was so entitled, the taxpayer points out (Br. 15) that the claim was never allowed (i.e., never adjudicated) and, therefore, contends that the proposed collection of the claim (Br. 18-19) is unauthorized and illegal.

While the Director readily agrees with the taxpayer that an adjudication of the tax claim could have been made during the course of the receivership proceeding (Section 6871(b) of the 1954 Code and Section 301.6871(a)-2(b) of Treasury Regulations on Procedure and Administration (1954 Code), Appendix, *infra*), he does not agree with the taxpayer's assumption that the lack of an adjudication is fatal to the claim and later collection thereof. It should also be pointed out, the Director contends, that while the statute and pertinent Regulations afford the taxpayer the right to have an adjudication in the court before which the receivership proceeding is pending, the taxpayer chose (through stipulation of its stockholders) not to avail itself of this opportunity and, instead, chose to terminate those proceedings before the claims of its creditors could be approved and paid. In other words, by assessing the tax and filing a claim with the receiver the Di-

rector did all that he was authorized and permitted to do by statute; the loss of judicial review was solely the taxpayer's fault and it should not now be permitted to complain. The taxpayer, therefore, is in the same position as any taxpayer who chooses to ignore a statutory notice of deficiency and thus does not avail himself of the right to have the merits of the proposed tax deficiency redetermined by the Tax Court. Such a taxpayer may have his day in court and may contest the deficiency determination, but he must first pay the deficiency and thereafter sue for a refund. This is what the Director contends the instant taxpayer must do.

Moreover, the Director's Section 6871(a) assessments are valid and subsisting and the absence of a judicial review by the receivership court does not preclude collection procedures from now being instituted against the taxpayer. Section 6873 (a) of the 1954 Code (Appendix, *infra*) prescribes the procedure for the collection (after the receivership proceeding) of taxes assessed under Section 6871 (a). Section 6873 (a) provides that any portion of a claim allowed in such a proceeding shall be paid by the taxpayer after notice and demand. The Regulations promulgated under this statute (Section 301.6873-1(a), Appendix, *infra*) indicate that the avenues for collection open to the Director with respect to an allowed claim are a "levy or proceeding in court within the period of limitation for collection after assessment." Subsection (b) of those Regulations (Appendix, *infra*) contains language which is

significantly different from that of subsection (a) and which covers the collection of Section 6871 (a) assessments where the tax claim thereunder has not been adjudicated (i.e., neither allowed nor disallowed) by the receivership or bankruptcy court.

Subsection (b) of Section 301.6873-1 of the Treasury Regulations begins by stating that "Section 6873 is applicable only where a claim for taxes is allowed in a receivership proceedings", and continues by discussing the collection of assessed taxes which were neither allowed nor disallowed (as in this case) because, for example, no claim for such taxes was ever filed with the receiver. As to these unadjudicated claims, the Regulations provide for collection "in equity or under other provisions of law," i.e., a proceeding to foreclose the tax lien which arose in the making of the assessment, or a proceeding to reduce the tax assessment to judgment.

If, therefore, the Director is made to bear the taxpayer's loss of judicial review by the receivership court, he is not estopped from collecting the taxes assessed against the taxpayer. It is perhaps true that the avenues of collection are slightly different with respect to unadjudicated claims as against adjudicated claims, but since the taxpayer cannot possibly be discharged with regard to his unadjudicated tax claims, they must be collectible.

Conclusion

The findings of fact, the conclusions of law, and the judgment of the District Court are correct and should therefore be affirmed.

Respectfully submitted,

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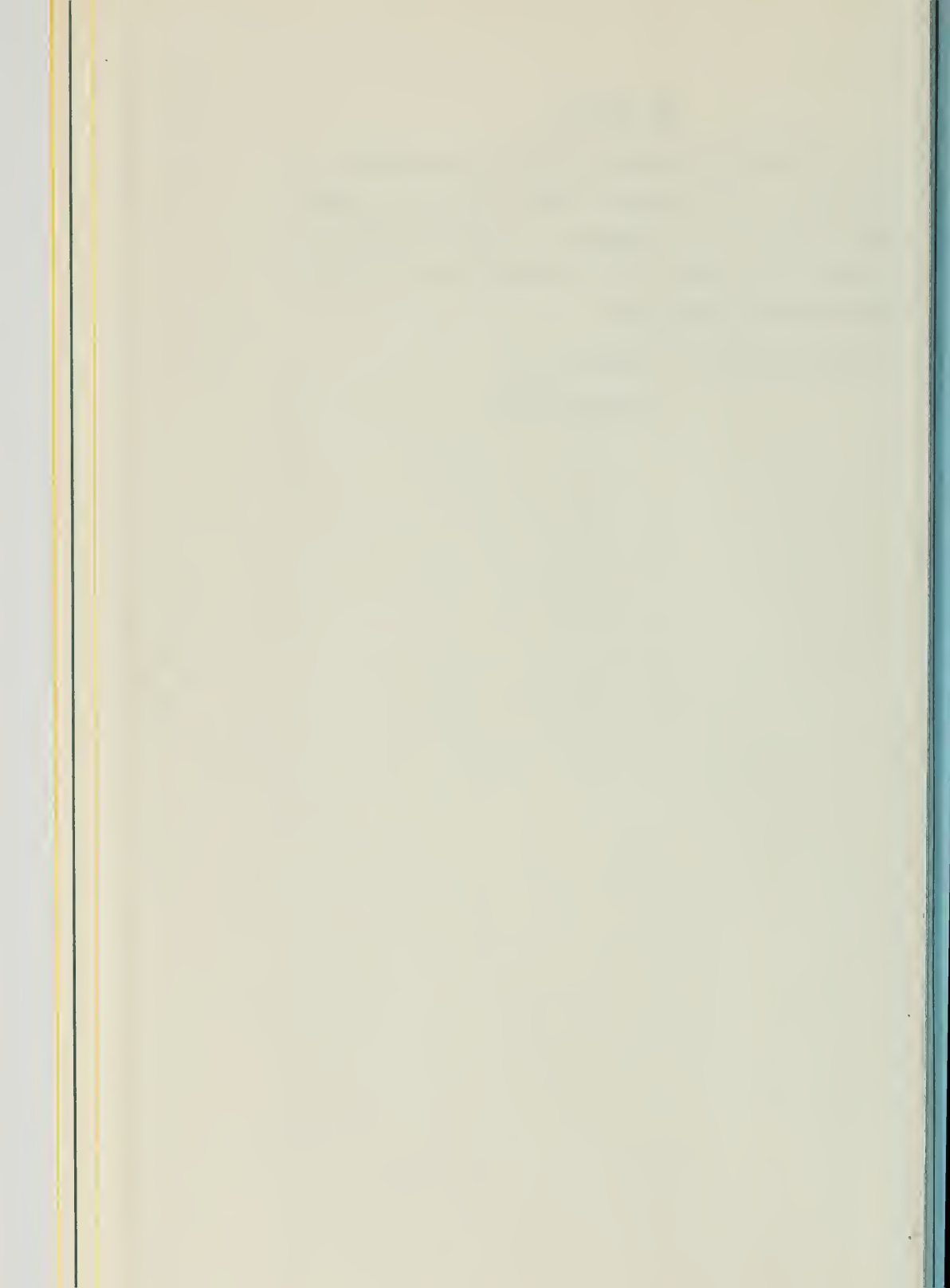
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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: 29th day of August, 1963.

LOYAL E. KEIR





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APPENDIX

Internal Revenue Code of 1954:

SEC. 6212. NOTICE OF DEFICIENCY.

(a) *In General.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by registered mail.

* * *

(26 U.S.C. 1958 ed., Sec. 6212.)

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) *Time for Filing Petition and Restriction on Assessment.*—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of

section 7421 (a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * *

(26 U.S.C. 1958 ed., Sec. 6213.)

SEC. 6871 [as amended by Sec. 88, Technical Amendments Act of 1958, P. L. 85-866, 72 Stat. 1606]. CLAIMS FOR INCOME, ESTATE AND GIFT TAXES IN BANKRUPTCY AND RECEIVERSHIP PROCEEDINGS.

(a) *Immediate Assessment.*—Upon the adjudication of bankruptcy of any taxpayer in any liquidating proceeding, the filing or (where approval is required by the Bankruptcy Act) the approval of a petition of, or the approval of a petition against, any taxpayer in any other bankruptcy proceeding, or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided by law) determined by the Secretary or his delegate in respect of a tax imposed by subtitle A or B upon such taxpayer shall, despite the restrictions imposed by section 6213(a) upon assessments, be immediately assessed if such deficiency has not theretofore been assessed in accordance with law.

(b) *Claim Filed Despite Pendency of Tax Court Proceedings.*—In the case of a tax imposed by subtitle A or B claims for the deficiency and such in-

terest, additional amounts, and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Tax Court; but no petition for any such redetermination shall be filed with the Tax Court after the adjudication of bankruptcy, the filing or (where approval is required by the Bankruptcy Act) the approval of a petition of, or the approval of a petition against, any taxpayer in any other bankruptcy proceeding, or the appointment of the receiver.

(26 U.S.C. 1958 ed., Sec. 6871.)

SEC. 6873. UNPAID CLAIMS.

(a) *General Rule.*—Any portion of a claim for taxes allowed in a receivership proceeding or any proceeding under the Bankruptcy Act which is unpaid shall be paid by the taxpayer upon notice and demand from the Secretary or his delegate after the termination of such proceeding.

* * *

(26 U.S.C. 1958 ed., Sec. 6873.)

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212 (a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * *

(26 U.S.C. 1958 ed., Sec. 7421.)

Treasury Regulations on Procedure and Administration (1954 Code):

§ 301.6213-1 *Restrictions applicable to deficiencies; petition to Tax Court.*

(a) *Time for filing petition and restrictions on assessment— * * **

* * *

(2) *Restrictions on assessment.* Except as otherwise provided by this section, by section 6861 (a) (relating to jeopardy assessments of income, estate, and gift taxes), by section 6871 (a) (relating to immediate assessment of claims for income, estate, and gift taxes in bankruptcy and receivership cases), or by section 7485 (in case taxpayer petitions for a review of a Tax Court decision without filing bond), no assessment of a deficiency in respect of a tax imposed by subtitle A or B of the Code and no levy or proceeding in court for its collection shall be made until notice of deficiency has been mailed to the taxpayer, nor until the expiration of the 90-day or 150-day period within which a petition may be filed with the Tax Court, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. As to the date on which a decision of the Tax Court becomes final, see section 7481. Notwithstanding the provisions of section 7421(a), the making of an assessment or the beginning of a proceeding or levy which is forbidden by this paragraph may be enjoined by a proceeding in the proper court.

* * *

§ 301.6871(a)-1 *Immediate assessment of claims for income, estate, and gift taxes in bankruptcy and receivership proceedings.*

(a) Upon (1) the adjudication of bankruptcy of any taxpayer in any liquidating proceeding, (2) the filing with a court of competent jurisdiction or (where approval is required by the Bankruptcy Act, 11 U.S.C. chs. 1-14) the approval of a petition of, or the approval of a petition against, any taxpayer in any other proceeding under the Bankruptcy Act, or (3) the appointment of any receiver for any taxpayer in a receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, the district director shall immediately assess any deficiency of income, estate, or gift tax (together with all interest, additional amounts, or additions to the tax provided by law), determined by him, if such deficiency has not heretofore been assessed in accordance with law. Such assessment shall be made immediately, whether or not a notice of deficiency has been issued, and without regard to the restrictions upon assessment under section 6213.

(b) As used in this section and §§ 301.6871(a)-2 to 301.6873-1, inclusive, the term "proceeding under the Bankruptcy Act" includes a proceeding under chapters I to VII, inclusive, of the Bankruptcy Act, or under section 75 or 77 (11 U.S.C. 203, 205), or chapters X to XIII, inclusive, of such Act, or any other proceeding under the Act.

§ 301.6871(a)-2 *Collection of assessed taxes in bankruptcy and receivership proceedings.*

(a) During a proceeding under the Bankruptcy Act (11 U.S.C. chs. 1-14) or a receivership proceeding in either a Federal or State court, generally the assets of the taxpayer are under the control of the court in which such proceeding is pending, and the collection of taxes cannot be made by levying upon such assets. However, any assets which under applicable provisions of law are not under the control of the court may be subject to levy. See paragraph (b) of this section and § 301.6871(b)-1 with respect to claims for such taxes. See section 6873 with respect to collection of unpaid claims.

(b) District directors should, promptly after ascertaining the existence of any outstanding liability against a taxpayer in any proceeding under the Bankruptcy Act or in any receivership proceeding, and in any event within the time limited by the appropriate provisions of the Bankruptcy Act, or by the appropriate orders of the court in which such proceeding is pending, file proof of claim covering such liability in the court in which such proceeding is pending. Such proof of claim should be filed whether the unpaid taxes involved have been assessed or not, except in cases where the instructions of the Commissioner direct otherwise; for example, where the payment of the taxes is secured by a sufficient bond. At the same time proof of claim

is filed with the bankruptcy or receivership court, the district director will send notice and demand for payment to the taxpayer, together with a copy of such proof of claim.

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§ 301.6873-1 *Unpaid claims in bankruptcy or receivership proceedings.*

(a) If any portion of the claim allowed by the court in a receivership proceeding, or in any proceeding under the Bankruptcy Act (11 U.S.C. chs. 1-14) remains unpaid after the termination of such proceeding, the district director will send notice and demand for payment thereof to the taxpayer. Such unpaid portion with interest as provided in section 6601 may be collected from the taxpayer by levy or proceeding in court within the period of limitation for collection after assessment. For the general rule as to such period of limitation, see section 6502, and for suspension of the running of the period provided in section 6502, see, for example, section 6503. For suspensions under other provisions of law, see, for example, section 11f of the Bankruptcy Act (11 U.S.C. 29(f)). Extension of time for the payment of such unpaid amount may be granted in the same manner and subject to the same provisions and limitations as provided in section 6161(c).

(b) Section 6873 is applicable only where a claim for taxes is allowed in a receivership proceeding or in a proceeding under the Bankruptcy Act. Claims

for taxes, interest, additional amounts, or additions to the tax may be collectible in equity or under other provisions of law although no claim was allowed in the proceeding because, for example, such items were not included in a proof of claim filed in the proceeding or no proof of claim was filed. Except in the case of a proceeding under section 77 or chapter X of the Bankruptcy Act, a tax or a liability in respect thereof is not discharged by a proceeding under such act, whether or not a claim is filed in such proceeding, and provisions suspending the running of the period of limitation on the collection of taxes are applicable, whether or not a claim is filed in such proceeding.